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Supreme Court of the United States

LORETTA E. LYNCH, ATTORNEY GENERAL,

Petitioner,

v.

LUIS RAMON MORALES-SANTANA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICI CURIAE* EQUALITY NOW, HUMAN RIGHTS WATCH, AND OTHER HUMAN RIGHTS ORGANIZATIONS AND INSTITUTIONS IN SUPPORT OF RESPONDENT

(List of Additional *Amici* Continued on Inside Cover)

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INTEREST OF THE *AMICI CURIAE*[1]

Amici curiae are independent human rights, women's rights and non-profit organizations working at the global, regional and national levels to address issues of nationality, citizenship, refugees and statelessness. They come from every region of the world. The full statements of interest of the *amici* appear in the Appendix to this brief.

SUMMARY OF ARGUMENT

This Court has often examined the opinions of the world community when considering constitutional cases that address concerns common among nations. The case at bar is such a case, presenting a question of domestic citizenship that both affects other nations and relates to fundamental issues of sex equality that cut across jurisdictional boundaries. As Petitioner acknowledges, when shaping laws affecting individuals born abroad, the government should not "ignore the state of the law throughout the world." (Pet'r Br. at 11.)

The disparate treatment of unwed mothers and unwed fathers in Sections 1401 and 1409 of the

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[1] The parties have lodged blanket letters of consent to the filing of *amicus curiae* briefs in this case. Pursuant to this Court's Rule 37.6, *amici* state that no party or counsel for a party authored this brief in whole or in part and that no entity or person, aside from *amici*, their members, and their counsel, has made a monetary contribution towards the preparation or submission of this brief.

Immigration and Nationality Act is not substantially related to the government's interest in protecting against the risk of statelessness and assuring a sufficient connection to the United States when conferring citizenship to foreign-born children of a U.S. citizen parent. The significant majority of other nations treat unwed citizen mothers and fathers equally in their ability to confer citizenship on their children. The Act's departure from this norm does not further either of the interests of avoiding statelessness or securing a connection to the United States.

The world community recognizes sex equality as a fundamental human right and has rejected sex-based citizenship classifications. International and regional treaties and decision-making bodies are concerned with statelessness, but they demand reconciling national policies to avoid statelessness with accepted norms of equal citizenship. Even the United States calls on the international community to grant equal rights to men and women to confer nationality on their children.

The laws of foreign nations have increasingly rejected sex-based classifications when conferring citizenship rights. *Amici* have gathered here foreign law decisions as examples of the consensus that has formed among other nations. All but one of the supreme courts from other nations that have addressed the sex-based citizenship laws in the past four decades have rejected sex-based classifications. Several of those highest courts characterize sex-

based citizenship classifications as "irrational" and "unreasonable."

A decision to correct the statute at issue here under the Fifth Amendment would find ample support from the opinions of the world community. In contrast, a decision upholding sex-based classifications would not only dilute domestic equal protection jurisprudence but would also run the risk of undermining equality norms worldwide, as other national supreme courts, as well as multiple other courts and law-making bodies, look to this Court for guidance on this common issue.

ARGUMENT

I. BOTH FOREIGN AND INTERNATIONAL LAW ARE RELEVANT TO THIS COURT'S REVIEW OF 8 U.S.C. §§ 1401(a)(7) AND 1409

For more than two centuries, this Court has, when relevant, examined the position of the world community and paid "decent respect to the opinions of mankind" in its decisions.[2] In some instances, review of the international context is imperative, since "an Act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."[3]

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[2] The Declaration of Independence ¶ 1 (U.S. 1776); *see* Sarah Cleveland, *Our International Constitution*, 31 Yale J. Int'l L. 1, 5-6, 14, 99 (2006).

[3] *Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804); *see The Paquete Habana*, 175 U.S. 677, 700 (1900).

In instances where domestic law is doctrinally intertwined with foreign laws, the examination of the relevant foreign legal doctrine has been a longstanding, uncontroversial practice.[4] A majority of the Court also finds utility in examining foreign and international laws and practices when common principles are at stake, because global consensus provides guidance relevant to the Court's "independent conclusion" regarding U.S. law.[5] As Justice Sandra Day O'Connor observed, "there is great potential for our Court to learn from the experience and logic of foreign courts and international tribunals – just as we have offered these courts some helpful approaches from our own legal traditions."[6]

The laws and practices of the world community have been particularly important when principles of liberty and equality are at issue. For example, in *Lawrence v. Texas*, the Court looked to the "values we share with a wider civilization," concluding that decisions from other countries and international entities that protected the liberty of individuals to engage in private intimate conduct

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[4] *See, e.g.*, *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 457-61 (1793); *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 163 n.a (1820).

[5] *See Graham v. Florida*, 560 U.S. 48, 80 (2010) (noting that the sentencing practice at issue has been "rejected the world over").

[6] Sandra Day O'Connor, *Federalism of Free Nations*, 28 N.Y.U. J. Int'l L. & Pol. 35, 41 (1997).

were relevant to its decision.[7] Similarly, in *Washington v. Glucksberg*, arising under the Due Process Clause of the Fourteenth Amendment, a majority of this Court catalogued the practices "in almost every western democracy" that criminalize assisted suicide.[8] Most recently, in *Obergefell v. Hodges*, the four dissenting justices cited the laws and practices of other nations and cultures to support their conclusions.[9]

The case at bar benefits from a review of foreign law, because the Immigration and Nationality Act is affected by the laws of other nations. Acquisition of citizenship is an instance where domestic law is intertwined with foreign law, requiring an understanding of the international context in which our own law is situated. Further, the central question in this case is an issue of common concern that crosses national boundaries. Conflicts between sex equality norms and citizenship laws have confronted national courts around the globe and have been addressed by many international and regional bodies. Cases involving

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[7] 539 U.S. 558, 576-77 (2003).

[8] 521 U.S. 702, 710 (1997).

[9] *See* 135 S. Ct. 2584, 2612 (2015) (Roberts, C.J., dissenting); *id.* at 2636 n.5 (Thomas, J., dissenting); *id.* at 2642 (Alito, J., dissenting); *see also Grutter v. Bollinger*, 539 U.S. 306, 344 (2003) (Ginsburg, J., concurring) (citing relevant international law).

these conflicts are particularly appropriate for comparative analysis.[10]

II. FOREIGN LAW DOES NOT SUPPORT USING SEX-BASED DIFFERENCES TO ADDRESS STATELESSNESS AND CONNECTIVITY

The asserted relationship between the differential sex-based requirements of Sections 1401 and 1409 is not substantially related to the achievement of the government's claimed twin interests in reducing the risk of statelessness and assuring a sufficient connection to the United States when conferring citizenship to foreign-born children of unmarried U.S. citizen parents. To justify its disparate treatment of unwed mothers and unwed fathers, the government focuses on the parents' status at a singular moment, asserting that "at the moment of birth, the mother of a child born out of wedlock was typically treated throughout the world as the child's only legal parent." (Pet'r Br. at 28.) This assertion is narrowly drawn in a way that makes the "moment of birth" seem to carry more weight than it actually does. Any broader view of the legal relationship between an unwed father and his child exposes the logical gaps in the government's position.

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[10] *See* Vicki Jackson, *Transnational Discourse, Relational Authority, and the U.S. Court: Gender Equality*, 37 Loy. L.A. L. Rev. 271, 351-58 (2003).

A. The Presuppositions Behind Petitioner's Argument Are Questionable

Three aspects of the government's assertion merit consideration before examining the putative relationship between the statute and the statelessness and connection interests invoked by the government.

First, the government's argument that only mothers have a "legally recognized relationship" (Pet'r Br. at 28) with a child at the "moment of birth" is founded on the unremarkable proposition that mothers, not fathers, give birth to children. This is literally true as a fact of biology, but inapt in assessing the risk that a foreign-born child of unwed parents will lack a nationality or in addressing the concern that such a child has a sufficient connection to the United States to be deemed worthy of citizenship. Any point about the divergence in "legal relationships" between unwed mothers or fathers and their foreign-born children that is not purely biological rests on assumptions that do not justify treating unwed fathers and mothers differently.

With the 1952 Act's removal of the "in the absence of such legitimation or adjudication" language,[11] the statute at issue effectively treats foreign national unwed fathers as either unknown or permanently out of the picture, which very often will not be the case. The government's argument does

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[11] Immigration and Nationality Act, ch. 477, 66 Stat. 238 (8 U.S.C. § 1409) (1952).

not adequately account for the role that unwed fathers commonly play in the lives of their children following birth, despite that role bearing directly on the governmental interests that supposedly motivated the creation of the discriminatory statutory scheme. Among other things, the government does not account for children born to parents who are not married but are nonetheless in a stable relationship. Nor does it account for mothers who do not maintain a role in their children's lives following birth, despite the "legal relationship" established at that time.

Second, the government's repeated reliance on "the moment of birth" begs the question. Only by framing its argument in terms of "the moment of birth" – rather than "an hour after birth," or "a day after birth," or "at the time the birth certificate is recorded" – can the government draw a distinction between the "legal relationships" of unwed mothers and fathers to their children that does not rely on impermissible gender stereotyping. But there is nothing special about the moment of birth for purposes of assessing whether the foreign-born children of unwed U.S. citizen mothers were, and are, at heightened risk of statelessness, or whether a child is likely to be raised free of competing national loyalties, such that a more burdensome physical presence requirement for the father is substantially related to the achievement of the government's objectives.

Although a father is not required to be present at "the moment of birth" as a matter of biology, as soon as he acknowledges the child he is in the same position as an unwed U.S. citizen mother with respect to his ability to foster a connection between his foreign-born child and the United States. An unwed father can present himself and take whatever steps are prescribed by the relevant nation to have himself legally established as his child's parent in some reasonable period following birth, whether those steps are as simple as signing a birth certificate or as involved as demonstrating proof of paternity. So it does not matter that at the precise "moment of birth," only the child's mother is incontrovertibly identifiable.

Third, it is the establishment of parentage by either parent, rather than the establishment of paternity by the father, that is a necessary step in the forming of a "legal relationship" between parent and child. The fact that mothers, generally speaking, can establish their parentage more easily should be irrelevant in determining the circumstances in which their children should be allowed to become U.S. citizens. The government states that "[e]ven today, the father of a child born out of wedlock anywhere in the United States must take some affirmative step to establish his legal status as the child's father." (Pet'r Br. at 41.) But this is a truism: any request by an unwed father to be recognized as the legal parent of his child requires some affirmative step, whether that step is

straightforward or more complex, and whether it is taken before or after birth. The only reason this is not the case for married fathers is the presumption of paternity based on matrimony. A birth mother's legal relationship with her child also must be established after the fact in certain countries, usually through an attestation and declaration of birth by an attending physician and the mother.[12]

Even where the mother's legal relationship with a child is established by operation of law at the moment of birth, many countries recognize an unmarried father's parentage at the moment of birth as well. For example, the laws of some countries provide that biological parents, whether married or not, are generally the holders of parental responsibility concerning their child, a responsibility that arises at childbirth.[13] Other countries provide that an unwed father may be recognized as the child's legal parent at the time of birth by providing

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[12] *See, e.g.*, France (Code Civil [C. Civ.] art. 57 (Fr.)); Ukraine (Family Code of Ukraine, ch. 12, Art. 125(1) (Ukr.)); *see also* Hague Conference on Private and International Law, *A Study of Legal Parentage and the Issues Arising from International Surrogacy Arrangements*, at 8, Prel. Doc. No. 3C (2014) (discussing countries in which a birth mother's legal maternity does not arise "by operation of law" at the moment of birth).

[13] *See, e.g.*, Czech Republic (Sec. 34 ¶ 2 Czech Family Code) (Czech)); Israel (CA 3077/90 John DoePlonit vs. John DoePloni, 49(2) PD 578 [1995] (Isr.)); Poland (Kodeks rodzinny i opiekuńczy [Family and Guardianship Code], Art. 93 § 1 (25 Feb. 1964) (Pol.)).

some written documentation beforehand.[14] Elsewhere, an unwed father may gain legal status through joint registration of the birth with the mother.[15] Still other countries allow unwed fathers to establish a legal relationship at the time of their child's birth by simply acknowledging parentage at that moment or by prior cohabitation with the birth mother under defined conditions.[16]

For many countries, the affirmative steps to establish filiation between an unwed father and his

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[14] *See, e.g.*, Switzerland (Schweizerisches Zivilgesetzbuch [ZGB], Code civil [CC], Codice civile svizzero [CC] [Civil Code] July 1, 2014, SR 21, RS 210, art. 298 (Switz.)).

[15] *See, e.g.*, England/Wales (Children Act, 1989, c.41, § 4(1) (Eng.)); *see also* Hague Conference on Private and International Law, *supra* note 12, at 10 (in many countries a father may voluntarily acknowledge legal paternity when it has not arisen by operation of law through a joint written statement with the birth mother); *cf.* Vietnam (Law on Vietnamese Nationality, Số: 24/2008/QH12, Art. 16.2 (Nov. 13, 2008) (child born abroad who has one Vietnamese parent and one foreign national parent gains nationality at birth if the parents so agree in writing prior to the birth)).

[16] *See, e.g.*, Dominican Republic (Ley No. 14-19, Codigo para la Proteccion de Ninos, Ninas y Adolescentes [Law No. 14-19, Code for the Protection of Children and Adolescents] Gaceta Official, Art. 21, Apr. 25, 1994 (enacted April 22, 1994) (unmarried father may acknowledge parentage after his child's birth)); Australia (*Family Law Act 1975* (Cth) s 69Q (Austl.) (unmarried father may establish legal relationship with child at time of birth by prior cohabitation with birth mother)); Canada (BC) (Family Law Act, S.B.C. 2011, c. 25, § 26(2)(d) (Can.) (same)); Canada (Ontario) (Children's Law Reform Act, R.S.O. 1990, c. C.12, § 8(1)(4)-(5) (Can.) (same)); New Zealand (Care of Children Act 2004, Public Act 2004 No 90, Cl. 17(3)(b) (N.Z.) (same)).

child do not occur until after the child is born.[17] Yet it is the fact that such steps are commonplace and often straightforward[18] that makes the statute's failure to account for them perplexing, if the aim of the statute were to address the interests of reducing statelessness and ensuring a sufficient connection to the United States. In most countries, affirmative steps to establish paternity or to record or attest to the fact of filiation are not meaningful obstacles to father-child legal relationships that would justify the differential physical presence requirements of unwed fathers and unwed mothers in the conferral of citizenship to their foreign-born children.

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[17] *See, e.g.*, Northern Ireland (Family Law Act (Northern Ireland), 1995, c. 12, § 7(1)(a) (as amended July 17, 2001) (unmarried father has parental responsibility if he becomes registered as the child's father)); Scotland (Family Law (Scotland) Act, 1995, c.36 § I(b)(ii) (as amended Jan. 20, 2006) (same)).

[18] *See, e.g.*, Scotland (Children (Scotland) Act, 1995, § 4(1)-(2) (as amended July 3, 1997) (after child's birth, unmarried parents can sign a form agreement prescribed by the Secretary of State to grant the father rights and to register him as the child's father)); Finland (Paternity Act 1975, c.3 § 15(1)-(3) (including amendments up to 379/2005) (after child's birth, unmarried father can voluntarily acknowledge paternity by signing acknowledgment in the presence of notary or other local official)); Iceland (Act in Respect of Children (Unofficial Translation) no. 76/2003, art. 4 (as amended by Act No. 115/2003) (parents fill out form and deliver it to national registry without any action from district magistrate)).

B. Foreign Law Does Not Support The Government's Rationale That Sex-Based Discrimination Is Necessary To Avoid The Risk Of Statelessness

The government asserts that the differential treatment of unwed U.S. citizen mothers and fathers under Sections 1401 and 1409 was motivated in large part by an interest in reducing the risk that foreign-born children of U.S. citizen unwed parents would be born stateless. The proffered rationale is that a child born abroad to an unwed U.S. citizen mother and a foreign citizen father faced particular hurdles in avoiding statelessness, because most *jus sanguinis* countries at the time the statutory provision was adopted purportedly would not permit their unwed male citizens to transmit their nationality to the child at the time of birth. (*See* Pet'r Br. at 30). Yet if anything, a more stringent physical presence requirement for unwed fathers now *increases* the risk of statelessness, a result at odds with Congress's supposed motivation.

The nationality laws of the significant majority of *jus sanguinis* countries today treat unwed citizen mothers and fathers equally in their ability to confer citizenship on their children. Most countries impose no sex-differential burden on unwed citizens – again, assuming that some requisite acknowledgment or establishment of parentage has been made. For example, as of 2015, 43 of 53 African countries treat unwed citizen fathers and mothers equally in conferring a right to

citizenship on their children, whether born at home or abroad.[19] The same is true for all European countries, in light of recent legislation in Denmark and Austria correcting their previous inequity on the subject.[20] As a result, there is no special risk of statelessness when an unwed U.S. citizen, regardless of sex, has a child with a citizen of one of those countries.

Moreover, in the few remaining countries that do impose sex-discriminatory restrictions on the conferral of citizenship by unwed parents, it is the children of unwed local *mothers* in those countries who are far more likely to bear that brunt of statelessness.[21] *Amici* have identified 21 countries in the world that do not permit an unmarried mother who is a citizen of that country to pass her nationality to children born abroad on an equal basis as an unmarried citizen father.[22] In 16 of those

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19 *See* African Commission on Human and Peoples' Rights, *The Right to Nationality in Africa* 68 (2015).

20 *See* Denmark (Consolidated Act on Danish Nationality, Act. No. 422, 7 June 2004 (as amended by Act No. 729 of 25 June 2014)); Austria (Verfassungsgerichtshof [VfGH] [Constitutional Court] 1984, Erkenntnisse und Beschlusse Verfassungsgeruchtshofes [VfSlg] No. 10.036/1984 (Austria)).

21 *See* Equality Now, *The State We're In: Ending Sexism In Nationality Laws* 14-16 & Annex (2016).

22 *See id.* (Bahrain, Brunei, Burundi, Iran, Iraq, Jordan, Kuwait, Lebanon, Liberia, Libya, Mauritania, Nepal, Oman, Qatar, Saudi Arabia, Sierra Leone, Somalia, Swaziland, Syrian Arab Republic, Tunisia, and the United Arab Emirates).

countries, it is also harder for unmarried mothers than for unmarried fathers to transmit their citizenship to children born inside the country.[23] Thus, to the extent the United States makes it more difficult for children of unwed U.S. citizen fathers and foreign citizen mothers to gain U.S. citizenship, the statute at issue has increased the risk of statelessness, rather than reduced it.

Conversely, *amici* have identified only 5 countries in the world – the United States, Madagascar, Malaysia, the Bahamas, and Barbados – in which an unmarried citizen father today faces a disproportionate burden in transmitting his nationality, beyond establishment of parentage. In the United States, Madagascar, and Malaysia, an unmarried father cannot pass his nationality to a child born abroad without meeting additional requirements unrelated to proof of paternity.[24] In the Bahamas and Madagascar, an unmarried father cannot pass his nationality to a child born inside the country on an equal basis as an unmarried mother.[25] And in the Bahamas and Barbados, an unmarried father cannot pass his nationality to a child born abroad at all.[26]

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[23] *See id.* (all named above except Iraq, Liberia, Mauritania, Sierra Leone, and Tunisia).

[24] See *id.* at 14-15, 66-68, 70-71.

[25] See *id.* at 14-15, 33-34, 66-68.

[26] *See id.* at 14-15, 33-34, 37.

In short, the different treatment of unwed U.S. citizen fathers and mothers under Sections 1401 and 1409 does nothing to reduce – and may well *increase* – the risk of statelessness. A one-year physical presence requirement for both unwed mothers and unwed fathers would protect against the risk of statelessness to a greater degree than a one-year requirement for mothers and a ten-year requirement for fathers.[27]

Many countries today have provisions for the transmission of nationality in cases where one or both parents are unknown or stateless, recognizing that special provision should be made to minimize the number of children born without a nationality.[28] The government asserts that Sections 1401 and 1409 serve as blunt instruments to account for that circumstance, but as we have shown, the statute is based on incorrect assumptions about foreign

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[27] The statute was amended in 1986 to shorten the physical presence requirement for unwed fathers from 10 years to 5 years. However, the 10-year requirement in the 1952 Act applies to the Respondent in this case.

[28] *See* United Nations Convention on the Reduction of Statelessness, Art. I, Sec. 1, Aug. 30, 1961, 969 U.N.T.S. 175 (granting nationality to persons born within their borders "who would otherwise be stateless"); *cf.* Jordan (Law No. 6 of 1954 on Nationality, art. 3(4) (Jan. 1, 1954) (last amended 1987) (establishing nationality for any person born in the country to a citizen-mother and Stateless father)); United Arab Emirates (United Arab Emirates: Federal Law No. 17 for 1972 Concerning Nationality, Passports and Amendments Thereof, art. 2(D) (Nov. 18, 1972) (same)).

citizenship law and may likely serve to work against its intended purpose. That is not rationally, let alone substantially, related to the purported goal of the statute.[29]

C. Foreign Law Does Not Support Using Sex-Based Differences To Ensure A Sufficient Connection To The United States

The asserted relationship between the physical presence requirements in Sections 1401 and 1409 and the concern that foreign-born children of unwed parents have a sufficient connection to the United States before citizenship should be granted is founded on premises that are particularly inapposite in today's world. According to the government, "a foreign-born child is presumptively subject to competing claims of national allegiance" if the child's parents are of different nationalities. (Pet'r Br. at 18.) A lower physical presence requirement was thus ostensibly appropriate for unwed U.S. citizen mothers because "at the time of her child's birth . .

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[29] Any purported concern about statelessness is immaterial with respect to the more than 30 countries, including Brazil, Canada, and Mexico, that currently confer unrestricted citizenship to children born within their borders. *See* K. Culliton-Gonzalez, *Born in the Americas: Birthright Citizenship and Human Rights*, 25 Harv. Hum. Rights J. 134-36 (2012); J. Feere, *Center for Immigration Studies, Birthright Citizenship in the United States: A Global Comparison* (2010). By definition, there is no risk of statelessness for children born in any of these *jus soli* countries, no matter the citizenship or marital status of their parents. Yet the differential residency requirement applies to children in these countries as well.

[there] would have been no competing parental claim of connection to a foreign country." (*Id.* at 32.)

Prior to 1934, U.S. nationality law reflected the apparent belief that U.S. citizen mothers were unable to pass on a sufficiently American character to their foreign-born children, no matter how long the mother had lived in the United States.[30] The development of the statute from the 1940 Act to the 1952 Act, however, resulted in unwed U.S. citizen mothers being deemed uniquely capable of ensuring, based on minimal time spent in this country, that their children would not lack a connection to the United States.

From the government's perspective, it is not that unwed U.S. citizen mothers are better able, or even more likely, to transmit "Americanism" to their children than unwed fathers. Rather, the government asserts that if a U.S. citizen mother is the only legally recognized parent of a foreign-born child at the time of birth, then there is no need to impose a heightened physical presence requirement, because there are no significant concerns that the child will be subject to competing national loyalties. In effect, a foreign-born child of an unwed U.S.

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[30] The first statute Congress enacted extending citizenship to foreign-born children provided that citizenship would pass automatically so long as the U.S. citizen father had ever resided in the United States, but made no such provision for a U.S. citizen mother. *See* Act of Mar. 26, 1790, ch. 3, 1 Stat. 104. That state of affairs persisted in the statutes passed in 1795, 1802, 1855, and 1907. *See Rogers v. Bellei*, 401 U.S. 815, 823-26 (1971).

citizen mother is forever treated as having only one legally recognized parent under the statute, "without regard to whether the father's paternity was later legally established." (Pet'r Br. at 28.) This scheme is premised on a counterfactual understanding of domestic and foreign law given the many ways that unwed fathers may – and frequently do – establish legal relationships with their children, as discussed above. Yet this treatment also stands at cross-purposes to the government's asserted concern of ensuring a sufficient connection between the child and the United States.

This disconnect can be illustrated simply: Jane Doe is a 20-year-old U.S. citizen who was born in the United States and lived there continuously until her first birthday, when her family moved to Brazil. She has resided in Brazil for the past 19 years, has never returned to the United States, and plans on living there for at least another 19 years. She has no immediate family in the United States. She is unmarried and has just given birth to a child whose father is an Argentinean national. John Smith is a 20-year-old U.S. citizen who was born in the United States and lived there continuously until three weeks shy of his 19th birthday, when he moved to Brazil. He has resided in Brazil for the past year but plans on moving back to the United States in the near future. He has many immediate family members in the United States. He is unmarried and has just fathered a child whose mother is an Argentinean national, and has acknowledged

paternity. There is no basis to conclude that Jane's child has a greater connection to the United States than John's child – in fact, just the opposite – yet under the statute as it applied to the Respondent in this case, Jane's child would be an American citizen and John's child would not.

Conversely, just because a child has not been "legitimated" by his or her foreign citizen father at the moment of birth does not mean the father is not in a stable relationship with the mother or that the father otherwise will not be a significant part of raising the child going forward, thus presenting the child with a foreign influence that could compete with the American character of the mother. Under this statute, an unwed U.S. citizen mother is presumed to be raising her child as an American, free of competing influences and loyalties, even if she is cohabitating with the foreign citizen father, and even if she marries him the day after the child is born. By contrast, the child of an unwed U.S. citizen father is presumed to be subject to the competing influence of the foreign mother's nationality, even if she is nowhere to be found.

The assumption that there are no competing national loyalties when the U.S. citizen mother is the only legally recognized parent at time of birth therefore does not withstand scrutiny. The differential treatment of unwed citizen mothers and unwed citizen fathers of foreign-born children cannot be justified as serving the interests of ensuring a

sufficient connection between the child and the United States.

III. THE OVERWHELMING WEIGHT OF WORLD OPINION SUPPORTS SEX EQUALITY IN CITIZENSHIP LAWS

A. International Treaties and Decisions of International Bodies Consistently Require Sex Equality in Citizenship Law

The world community has spoken clearly through international treaties and decisions of international bodies to reject sex-based citizenship classifications. International law universally recognizes sex equality as a fundamental human right.[31]

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[31] *See* Universal Declaration of Human Rights, G.A. Res. 217 (III) A, at 71, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) ("Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as sex"); International Covenant on Civil and Political Rights ("ICCPR"), art. 3, Dec. 16, 1966, 999 U.N.T.S. 171 ("[t]he States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant"); Convention on the Rights of the Child ("CRC"), art. 2(1), Nov. 20, 1989, 1577 U.N.T.S. 3 ("States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's sex"); CEDAW, *infra* note 32, art. 2(a) (the purpose of the convention is "[t]o embody the principle of the equality of men and women in their national constitutions and to ensure, through law and other appropriate means, the practical realization of this principle").

The Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW")[32] addresses sex equality in the citizenship context, stating that "State Parties shall grant women equal rights with men with respect to the nationality of their children."[33] The Convention on the Rights of the Child ("CRC") guarantees every child the right to acquire nationality. Although the United States has signed but not ratified CRC and CEDAW, both conventions have been widely ratified by member countries of the United Nations, and are thus considered customary international law.[34]

This principle of sex equality, and in particular sex equality in citizenship law, has been reinforced by international and regional declarations, conventions and conferences. For instance, the United Nations Fourth World Conference on Women in 1995 adopted the Beijing Platform, highlighting the commitment of member

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[32] Convention on the Elimination of All Forms of Discrimination against Women ("CEDAW"), Dec. 18, 1979, 1249 U.N.T.S 13.

[33] *Id.* art. 9(2).

[34] Following Somalia's ratification of the CRC on 1 October 2015, the United States is the only country that has not ratified this treaty. *See* United Nations Treaty Collection, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&clang=_en. The only countries that have not ratified CEDAW are the United States, Iran, Palau, Somalia, Sudan and Tonga. *See* United Nations Treaty Collection, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&clang=_en.

countries to the principle of sex equality.[35] In addition, numerous regional inter-governmental bodies have announced strong commitments to sex equality.[36]

To combat the problem of statelessness, international conventions and treaties frequently include a right to nationality.[37] The Human Rights Committee monitors the implementation of the International Covenant on Civil and Political Rights ("ICCPR"), which the United States has ratified. Under the ICCPR, "no discrimination with regard to the acquisition of nationality should be admissible under internal law as between legitimate children and children born out of wedlock or of stateless

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[35] *See* Fourth World Conference on Women, Beijing Declaration and Platform for Action, U.N. Doc. A/CONF.177/20 (Sept. 15, 1995).

[36] European Convention on Human Rights, art. 14, Nov. 4, 1950, 213 U.N.T.S. 221 ("The enjoyment of the rights and freedoms shall be secured without discrimination on any ground such as sex."); American Convention on Human Rights, art. 1(1), Nov. 22, 1969, 1144 U.N.T.S. 143 ("The States Parties to this Convention undertake to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of sex."); The African Charter on Human and Peoples' Rights, arts. 18.1, 19, June 27, 1981, 1520 U.N.T.S. 217 ("The State shall ensure the elimination of every discrimination against women"; "All people shall be equal; they shall enjoy the same respect and shall have the same rights.").

[37] *See, e.g.*, ICCPR, *supra* note 31, art. 24(3) (promising every child a right to acquire nationality); CRC, *supra* note 31, art. 7(1) (guaranteeing right to acquire nationality).

parents or based on the nationality status of one or both of the parents."[38] The United States has recognized the importance of implementing the ICCPR domestically, stating in Executive Order 13107 that "[i]t shall be the policy and practice of the Government of the United States ... [to fully] respect and implement its obligations under the international human rights treaties to which it is party, including the ICCPR."[39]

Numerous regional treaties include similar provisions.[40] This right to nationality complements the right to equal protection universally found in these treaties.[41] Indeed, in a widely-circulated report, the International Law Association Committee

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[38] Human Rights Committee, CCPR General Comment No.17: Article 24 (Rights of the Child) (Apr. 7, 1989), ¶ 8.

[39] *See* Executive Order 13107, 63 Fed. Reg. 68,991, Implementation of Human Rights Treaties (Dec. 10, 1998).

[40] *See, e.g.*, European Convention on Nationality ("ECN"), art. 4(a), Nov. 6, 1997, 2135 U.N.T.S. 213 ("[E]veryone has the right to a nationality."); American Convention on Human Rights, *supra* note 36, art. 20(1) ("Every person has the right to a nationality."); African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990) ("Every child has the right to acquire a nationality."); League of Arab States, Arab Charter on Human Rights, art. 29(1), May 22, 2004 ("Everyone has the right to nationality.").

[41] *See, e.g.*, ECN, *supra* note 40, art. 5 ("The rules of a State Party on nationality shall not contain distinctions or include any practice which amounts to discrimination on the grounds of sex, religion, race, colour, national or ethnic origin.").

on Feminism and International Law argued that where a treaty contains both provisions, they must be read together to prohibit sexual discrimination in the laws awarding nationality.[42] Following completion of this report, the International Law Association issued a resolution calling for the elimination of sex-based preferential treatment in nationality rules, and recommending that in cases where parents are of different nationalities "each parent should have the right to transmit her or his nationality to the child."[43]

When faced with laws that create tension between the rights to citizenship and equal protection, international courts and tribunals have held that sex equality is an inviolable principle that must apply to citizenship law. This international case law establishes that the goal of avoiding statelessness does not trump the goal of sex equality, especially when the statelessness can be minimized without giving preference to one sex over another. For instance, in 1985, the European Court of Human Rights ruled that disparate treatment of men and women in the United Kingdom with respect to the ability of non-citizen spouses to enter and remain in

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[42] *See* International Law Association, Committee on Feminism and International Law, Final Report on Women's Equality and Nationality in International Law, 37 (2000) (analyzing comparative case law and international law on sex equality and citizenship as of 2000).

[43] *See* International Law Association, Feminism and International Law, Res. 5/2000 §§ 3, 7 (July 25, 2000).

the country violated the equal protection clause of the European Convention on Human Rights.[44] The court recognized that "the advancement of the equality of the sexes is today a major goal," and that, accordingly, there must be "very weighty reasons" to justify "a difference of treatment on the ground of sex."[45] The court found that the United Kingdom's argument that the law should pass scrutiny because it gave "more favourable" treatment to a traditionally disfavored group did not qualify as such a reason.[46]

The Inter-American Court of Human Rights came to the same conclusion when it responded to Costa Rica's request for an advisory opinion on its citizenship laws.[47] The proposed Costa Rican law allowed women who married Costa Rican nationals to apply for citizenship, but did not extend the same opportunity to men.[48] Relying on provisions of the American Convention on Human Rights that

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[44] *Abdulaziz v. United Kingdom*, 94 Eur. Ct. H.R. (ser. A) at 83 (1985).

[45] *Id.* at 78.

[46] *See id.* at 82; *see also Shirin Aumeeruddy-Cziffra and 19 Other Mauritian Women v. Mauritius*, Communication No. R.9/35, U.N. Doc. Supp. No. 40 (A/36/40) at 134 (1981) (sex-based citizenship classification conferring legal rights to foreign wives of Mauritian citizens, but not to foreign husbands, violated the ICCPR's equality provisions).

[47] Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica, Advisory Opinion OC-4/84, Inter-Am. Ct. H.R. (ser. A) No. 4 (Jan. 19, 1984).

[48] *Id.* ¶¶ 64-68.

guaranteed equal protection under the law, equality in marriage, and access to nationality, the court directed Costa Rica to remove the specific reference to women so that the law would apply to all foreigners who married Costa Rican nationals.[49]

In November 2014, the U.N. Committee on the Elimination of Discrimination Against Women, which monitors the implementation of CEDAW, adopted General Recommendation No. 32 on the gender–related dimensions of refugee status, asylum, nationality and statelessness of women.[50] The Committee made a number of specific recommendations that States should follow to ensure they do not have discriminatory nationality laws on the basis of sex. The U.N. Working Group on discrimination against women in law and in practice has also highlighted the need for legal reform in its communications to governments regarding their sex-based nationality laws.[51]

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[49] *Id.* ¶ 67; *see also Case of the Yean and Bosico Children v. The Dominican Republic*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 130, at 141 (Sept. 8, 2005) (state authority to determine rights to nationality must be reconciled with principles of equality); Brad K. Blitz, Statelessness, Protection and Equality (2009) (discussing approaches to reconciling statelessness and equality).

[50] Committee on the Elimination of Discrimination Against Women, General Recommendation No. 32, CEDAW/C/GC/32 (Nov. 5, 2014).

[51] *See, e.g.*, Human Rights Council, Communications report of Special Procedures, A/HRC/28/85 (Feb. 19, 2015); Human

The United National Human Rights Council ("HRC") has sought to promote equal rights to nationality. In 2012, the United States led the adoption of a HRC resolution, "The Right to a Nationality: Women and Children."[52] The U.S. State Department promoted this resolution[53] following the launch of a global initiative to promote women's equal right to nationality.[54] In conjunction with this campaign, the U.S. Department of State used its annual Country Reports on Human Rights Practices to raise human rights concerns about other nations with sex-based nationality laws.[55]

In 2016, the United States and a core group of countries introduced a resolution, "The Right to a Nationality: Women's Equal Nationality Rights in Law and in Practice,"[56] which calls on all

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Rights Council, Report of the Working Group, A/HRC/29/40, ¶ 5 (Apr. 2, 2015).

[52] *See* Human Rights Council Res. 20/4, 20th Sess., June 18 – July 6, 2012, A/HRC/RES/20/4 (July 16, 2012).

[53] *See* Press Release, U.S. Dep't of State, The Right to a Nationality: Women and Children Human Rights Council: 20th Session (July 5, 2012).

[54] *See* U.S. Dep't of State, Bureau of Population, Refugees, and Migration, Fact Sheet, Women's Nationality Initiative (Mar. 8, 2012).

[55] *See, e.g.*, U.S. Dep't of State, Equatorial Guinea 2015 Human Rights Report (the country's civil code discriminates against women in the area of nationality).

[56] *See* Press Release, U.S. Dep't of State, Key U.S. Outcomes at the U.N. Human Rights Council 32nd Session (July 6, 2016).

governments to ensure gender equal nationality rights in compliance with States' obligations under international law. The adopted resolution "[u]rges all States to refrain from enacting or maintaining discriminatory nationality legislation" and to "take immediate steps to reform nationality laws that discriminate against women by granting equal rights to men and women to confer nationality on their children."[57] The resolution was ultimately co-signed by more than 100 countries.[58]

B. National Supreme Courts Have Repeatedly Recognized the Importance of Sex Equality in Citizenship Laws

The case at bar presents a specific question regarding the citizenship status of a child born out of wedlock outside the United States to a citizen father, and raises the more general question of when, if ever, sex-based classifications are a defensible component of the nation's citizenship laws. This brief canvasses the conclusions and reasoning of foreign jurists who have addressed this general question in their own domestic contexts. In total, *amici* have identified eleven supreme courts – the highest courts of their respective nations – that have

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[57] Human Rights Council Res. 32/7, 32nd Sess., June 13 – July 8, 2016, A/HRC/RES/32/7 (July 18, 2016).

[58] *See* U.S. Dep't of State, *supra* note 56.

issued rulings of this type in the past four decades.[59] All but one of these courts rejected the use of sex-based classifications to limit citizenship rights. Many of the courts rejecting sex-based classifications used the strongest possible terms to criticize the distinctions. The reasoning of these jurists sounds a number of themes that resonate with the case at bar.

1. All Non-U.S. Supreme Courts Ruling in Recent Decades, Save One, Have Recognized the Presumptive Importance of Sex Equality in Citizenship Laws

All of the national supreme courts identified by *amici* that have addressed sex-based citizenship laws have, with the exception of Egypt, found that the important legal norm of equality overrides competing concerns offered to justify sex-based classifications. For example, when the Supreme Court of Canada struck down a law providing that children born abroad to a Canadian mother would be subjected to a security check and an oath when seeking citizenship, while those born abroad to a Canadian father would not, it reviewed the classification under its constitutional guarantee of equality protection and equal benefit of the law "without discrimination based on . . . sex."[60] The

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[59] The supreme court (or equivalent) cases identified by *amici* are from Austria, Benin, Botswana, Canada, Egypt, Germany, Italy, Japan, Nepal, Scotland and Zimbabwe.

[60] *Benner v. Canada (Sec'y of State)*, [1997] 1 S.C.R. 358, ¶ 10 (Can.).

parties and the court readily accepted that "establishing a commitment to Canada and safeguarding the security of its citizens" were "pressing" and "substantial" governmental objectives.[61] Yet the justices concluded that the law was irrational.[62]

According to the court, "the gender of a citizenship applicant's Canadian parent has nothing to do with the values of personal safety, nationbuilding or national security underlying the Citizenship Act."[63] The court was particularly concerned about the immutable nature of the classification, noting that the strict application of equality principles is critically important when access to citizenship is restricted based on factors "so completely beyond the control of an applicant as the gender of his or her Canadian parent."[64] The court equalized treatment of mothers and fathers by extending the less onerous standards to Canadian mothers and declared the sex-based statutory provisions to be without force or effect.[65]

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[61] *Id.* ¶ 94.

[62] *Id.* ¶¶ 95-101.

[63] *Id.* ¶ 67. The Canadian Supreme Court summarily rejected the claim that the remeliorative nature of the challenged legislation, which provided more generous citizenship provisions to women than earlier laws, would insulate the sex-based classifications from review. *Id.* ¶ 75.

[64] *Id.* ¶ 85.

[65] *Id.* ¶¶ 1, 103.

Likewise, in 2008, the Supreme Court of Japan struck down a sex-based classification affecting the ability of out-of-wedlock children to acquire Japanese citizenship.[66] Specifically, the challenged law provided that a child born out of wedlock to a Japanese father and a non-Japanese mother and acknowledged by the father after birth could acquire Japanese nationality only if the parents married.[67] No such marriage requirement was imposed on the out-of-wedlock child of a Japanese mother and a non-Japanese father.[68]

The Japanese high court credited the importance of ensuring ties between the out-of-wedlock child and Japan, noting that the sex-based provisions might have contributed to this purpose in the past.[69] However, the court concluded that this antiquated rationale was insufficient to uphold discriminatory provisions in contemporary times, in light of the Japanese constitution's equality guarantee. As the majority stated, many other nations are "moving toward scrapping discriminatory treatment by law against children born out of wedlock," and "the realities of family life

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[66] Saikō Saibansho [Sup. Ct.] June 6, 2008, Hei 6 (Gyo-Tsu) no. 135, 62 Saikō Saibansho Minji Hanreishū [Minshū] Majority § 2 (Japan) (discussing Japanese Constitution, art. 14, ¶ 1) (translated at http://www.courts.go.jp/app/hanrei_en/detail?id=955).

[67] *Id.* § 4(2)(a).

[68] *Id.* § 4(2)(d).

[69] *Id.* § 4(2)(a), (b).

and parent-child relationships have changed and become diverse."[70] Justice Izumi's concurrence, addressing sex equality as well as birth status discrimination, added that in light of these societal changes, this law seemed to be based on a "stereotyped and rigid way of thinking."[71] The court concluded that the distinction in the statute did not demonstrate the "reasonable relevance" necessary to pass constitutional muster.[72] The court excised the marriage requirement from the statute, thereby equalizing the derivative citizenship standards for Japanese fathers and mothers and granting citizenship to the appellant before the court.[73]

In 1974, the Federal Constitutional Court of Germany struck sex-based nationality laws that precluded German mothers, but not fathers, from transmitting citizenship to their children.[74] The German government argued that abolition of sex-based classifications would lead to more instances of dual citizenship, a status deemed legally problematic at the time. The court rejected this justification, concluding that it was not sufficiently compelling to

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[70] *Id.* § 4(2)(c).

[71] *Id.* at Izumi Concurrence § 3.

[72] *Id.* at Majority § 4(3).

[73] *Id.* § 5(2).

[74] Bundesverfassungsgericht (BverfG) (Federal Constitutional Court) May 21, 1974, 37 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 217 (Ger.).

warrant overriding constitutional equality principles.[75]

In 1983, the Italian Constitutional Court also invoked constitutional equality principles to strike down a 1912 law providing that the child of a male Italian citizen was an Italian citizen by birth but making no such provision for the child of a female Italian citizen.[76] As in Germany, the government argued that sex-based citizenship classifications were necessary to avoid dual nationality. The court concluded, however, that the constitutional principle of equality took precedence, despite the inconveniences caused by dual nationality.[77]

The highest court of Botswana also deemed irrational a law that conditioned the citizenship of a child born in Botswana to married parents solely on the citizenship of the child's father, regardless of the mother's citizenship.[78] In reaching this conclusion, the court determined that the Botswana Constitution guaranteed equal protection on the basis of sex – citing as a model the jurisprudence of the United States construing our own Equal Protection Clause.[79] The court concluded that the

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[75] *Id.*

[76] Corte Costituzionale, 28 Gennaio 1983, Giur. it. 1983, I, 91 (It.).

[77] *Id.*

[78] *Attorney General v. Unity Dow*, (1992) 103 I.L.R. 128, 131 (Bots.).

[79] *Id.* at 132 (citing *Craig v. Boren*, 429 U.S. 190 (1976)).

discriminatory provisions burdening mothers were *ultra vires* and equalized the provisions by extending the rules applicable to fathers.[80]

Four other high courts have reached similar conclusions. In 1995, the Zimbabwe Supreme Court found that a sex-based classification impinging on women's citizenship rights, *i.e.*, the denial of the right to live in Zimbabwe after marrying an alien, violated the nation's constitutional equality principle.[81] Likewise, the Supreme Court of Nepal issued a writ of mandamus to preclude government enforcement of a provision that dictated different treatment as between citizen men and citizen women when transmitting visa rights to their spouses.[82]

In 2014 Benin's highest constitutional court found unconstitutional provisions of the nationality code that imposed sex-based rules on parents seeking to pass on their nationality to their children. According to the court, the provisions constituted flagrant violations of the non-discrimination principles in Benin's constitution.[83]

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[80] *Id.* at 134.

[81] *Rattigan and Others v. Chief Immigration Officer*, 1995(2) SA 182 (ZS) (Zim.).

[82] *Meera Gurung v. Her Majesty's Gov't, Dep't of Central Immigration, Ministry of Home Affairs*, Dec'n No. 4858 2051, ¶ 14 (S. Ct. 1994) (Nepal).

[83] *Benin Constitutional Court Decision*, DCC 14-172 (Sept. 16, 2014).

Finally, in 2016, the highest tribunal in Scotland construed 2009 revisions to the British nationality law so that a child born abroad of a mother of British descent could gain citizenship on an equal basis as a child born in the United Kingdom to a mother of British descent. As the court stated in construing the law, the 2009 revisions were intended as "an antidote to nationality law's long-standing gender discrimination," in conformity with the United Kingdom's international obligations under CEDAW. The court concluded that it should not assume that the legislature "intended to reintroduce aspects of gender discrimination previously discarded."[84]

Amici have identified only one foreign supreme court that has upheld sex-based classifications in recent decades. In June 2010, the Supreme Administrative Court of Egypt upheld a law that established a process for stripping the citizenship of Egyptian men who marry Israeli women in circumstances where the government determined that the marriage raised a threat of foreign spying.[85] This case, however, is aberrational, given the deep and long-standing tensions between the two countries and the fact that Egyptian nationality law has generally bent toward equality. Egyptian law was amended in 2004 to allow married

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[84] *Romein v. Adv. General for Scotland*, [2016] CSIH 24 (Scot.).

[85] Cairo Court Rules on Egyptians Married to Israeli Women, BBC News, June 5, 2010.

Egyptian women the same right as married men to pass their nationality to their children in conformity with the Egyptian Constitution.[86]

The Egyptian restriction on citizenship of those who marry foreigners is not entirely alien to U.S. law; American women faced restrictions on marriage to non-citizens almost a century ago, for similar reasons.[87] While those particular restrictions were repealed in 1922, the sex-based classifications that remain a part of U.S. citizenship law, and that are challenged here, are a legacy of that period.[88]

2. National Supreme Courts Have Determined that the Judiciary Can Properly Require Sex Equality in Citizenship Laws

Recognizing the importance of citizenship criteria to sovereign identity, a number of national courts have grappled with the question of the

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[86] Law No. 154 of 2004 (To Amend Provisions of Law No. 26 of 1975 Concerning Egyptian Nationality) Al-Jarida Al-Rasmiyya, 26 July 2004 (Egypt).

[87] *See, e.g., Kerry v. Din*, 135 S. Ct. 2128, 2135-36 (2015) (Scalia, J., plurality opinion) ("Modern equal-protection doctrine casts substantial doubt on the permissibility of such asymmetric treatment of women citizens in the immigration context, and modern moral judgment rejects the premises of such a legal order."); *Miller v. Albright*, 523 U.S. 420, 463-64 (1998) (Ginsburg, J., dissenting).

[88] *Miller*, 523 U.S. at 463-68 (Ginsburg, J., dissenting); *Nguyen v. INS*, 533 U.S. 53, 89 (2001) (O'Connor, J., dissenting).

judicial role in reviewing citizenship laws. The supreme courts that have squarely addressed this issue have concluded that the judiciary has an important role to play in enforcing equality norms, and that the court can serve that function without impinging on legislative authority over citizenship.

The issue of the court's role was addressed by the Japanese Supreme Court. There, the court noted that criteria for acquiring nationality are generally left to the legislature, which is in a position to take into account a range of social and political issues.[89] However, wrote the court, any law that "amounts to discriminatory treatment without reasonable grounds" should be subject to constitutional scrutiny by the courts.[90] The court proceeded to characterize Japan's sex-based nationality law as an unreasonable exercise of legislative power and excised the provision imposing a greater burden on men.[91]

The Court of Appeal of Botswana was similarly explicit in addressing the parameters of judicial review. In considering the constitutionality of the sex-based provision of the Botswana Citizenship Act, the court observed that "[w]here the legislature is confronted with passing a law on citizenship, its only course is to adopt a prescription which complies with the imperatives of the

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[89] 62 Minshū at Majority, *supra* note 66, § 4(1).

[90] *Id.*

[91] *Id.* § 5(1).

Constitution, especially those which confer fundamental rights to individuals in the State."[92] Finding that the sex-based approach taken by the legislature was irrational, the court held the citizenship law to be ultra vires under the Constitution.[93]

Finally, the Supreme Court of Nepal noted that under the language of its constitution, decisions regarding citizenship are generally left to the discretion of the executive body of the government.[94] However, where the government policy violated a constitutional provision, the court opined, "there should be reasonable cause" to support the policy.[95] The court concluded that the sex-based law at issue did not meet even the minimal test of reasonableness.

The international community has committed to both sex equality and the elimination of statelessness, and has determined that the former must not be sacrificed for the latter. Nor can restrictive citizenship laws, such as the law in question here, be justified on the grounds that they give a preference to women. This Court, therefore, should follow and adhere to the growing

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[92] *Unity Dow*, *supra* note 78, at 139.

[93] *Id.* at 158.

[94] *Meera Gurung*, *supra* note 82, ¶ 14.

[95] *Id.*

international consensus for equal protection under nationality law.

CONCLUSION

The judgment of the Second Circuit should be affirmed.

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Appendix

APPENDIX

Equality Now is an international human rights organization working for the protection and promotion of the rights of women and girls worldwide with a membership network of individuals and organizations in over 190 countries. Equality Now is a co-founder and steering committee member of the Global Campaign for Equal Nationality Rights, a coalition advocating for international action to reform laws in countries where women are prevented from passing their nationality to their children or spouses on an equal basis with men. Since 1999, Equality Now has highlighted in its reports on sex discriminatory laws the need for 8 U.S.C. §§ 1401 and 1409 to be amended. This would be in accordance with the commitment made by the U.S. government, together with other governments, in ¶ 232(d) of the Platform for Action, Report of the Fourth World Conference on Women, Beijing, Sept. 4-15 1995, U.N. Doc. A/CONF.177/20, resolution I, Annex II, to revoke laws that discriminate on the basis of sex. Equality Now submitted a brief with other organizations as *amici* curiae in support of petitioners in *Flores-Villar v. United States*, 564 U.S. 210 (2011), which challenged the constitutionality of 8 U.S.C. §§ 1401(a)(7) and 1409 with regard to the different sex-based residency requirements for unmarried fathers and unmarried mothers in transferring their citizenship to their children born overseas, as well as in support of petitioners in *Nguyen v. INS*, 533 U.S.

53 (2001) which challenged the constitutionality of 8 U.S.C. § 1409, based on international law and emerging customary international law.

Arab Women Organization (AWO) is a women's rights organization working for the promotion of the rights of women and girls with a membership network that includes 88 women's community based organizations (CBOs). AWO is working for the abolishment of discrimination in the Jordanian Nationality Law, and the lifting of the reservation on Article 9 paragraph 2 of CEDAW, in order for citizenship to be granted to spouses and children born to Jordanian mothers married to non-Jordanians. AWO has been working for gender equality and women's rights since 1970.

Human Rights Watch (HRW) is an independent nongovernmental organization that monitors and reports on human rights issues in more than 90 countries around the world. Established in 1978, Human Rights Watch conducts fact-finding research, exposes human rights abuses, and undertakes advocacy to press for changes in policy and practice that promote human rights. Its work is guided by international human rights and humanitarian law, and respect for the dignity of each human being. HRW has filed amicus briefs before various bodies, including U.S. courts and international tribunals, including on the issues of nationality and citizenship.

The Institute on Statelessness and Inclusion (ISI) is an independent non-profit organization based in the Netherlands committed to promoting the human rights of stateless persons and fostering inclusion to end statelessness. ISI works to promote the inclusion of the stateless and disenfranchised through research, education, partnership and advocacy on a number of thematic priorities including gender equality. ISI is a member of the steering committee of the *Global Campaign for Equal Nationality Rights* which aims to eliminate gender discrimination in nationality laws. ISI has engaged in international advocacy on gender equality in nationality laws through submissions to United Nations bodies, including the Committee on the Rights of the Child, the Committee on the Elimination of All Forms of Discrimination against Women and the Universal Periodic Review of the Human Rights Council, in collaboration with the Global Campaign and other partners. ISI has also researched and analyzed how these bodies address the problem of gender discrimination in transmission of nationality. At the national level, ISI has engaged in research, advocacy and capacity building in a number of countries as well as developing the capacity of national organizations to work on this issue through global and regional training courses on statelessness.

The International Women's Development Agency (IWDA) is the leading agency in Australia working on women's rights and gender equality in

the Asia Pacific. Over a thirty-year history IWDA has worked with 194 program partners across 36 countries and territories. Today we focus our partnership work in countries across Asia Pacific and collaborate on research, advocacy and policy through national, regional or global platforms and coalitions. Our work seeks to promote changes in policy and practice towards gender equality and full realisation of women's rights, and to support and enable women as agents of this change.

The Latin American and Caribbean Committee for the Defense of Women's Rights (CLADEM), founded in 1987, is a feminist regional network of individuals and non-governmental organizations based in Lima, Peru with affiliates in fifteen countries working for the full enjoyment of women's rights, based on principles of equality and non-discrimination, among others. CLADEM has had consultative status with the United Nations since 1995 and was authorized to take part in activities at the Organization of American States in 2002, and has had consultative status with UNESCO since 2009. CLADEM promotes the development and adoption of international and regional human rights instruments, and it holds governments accountable for the lack of implementation of women's human rights standards by submitting reports as well as filing strategic litigation cases at the national and international levels. In March 2009, CLADEM was awarded the

King of Spain Human Rights Prize and the Gruber Prize in 2010.

Lawyers for Human Rights is a human rights organisation based in South Africa. The organization runs a Statelessness Project through its Refugee and Migrant Rights Programme. It advocates for equal nationality rights and provides direct legal services to stateless persons or those at risk of statelessness. It has conducted strategic litigation on statelessness in South Africa since 2011 and has a 36 year track record of assisting clients to access their rights through the courts.

Questions de Femmes is an association that works for the promotion and protection women's rights in Togo. It is comprised of advocates who put forward their legal expertise for the benefit of women, especially women who do not have the means to pay for legal services. Questions de Femmes collaborates with associations and NGOs in Togo who channel to Questions de Femmes cases of women's rights violations that require legal intervention. It enjoys recognition in judicial circles in Togo as it seeks to work towards ensuring access to justice by all.

Tafawuq Center for Women and Gender is an organization based in Bahrain that strives to work in partnership with civil society organizations to raise women's awareness about their human rights and to shed light on the reasons that hamper the development of the situation of women and their

enjoyment of full citizenship. This is done through: organizing workshops and discussion loops; organizing public campaigns; showing related movies and having discussions; preparing research studies and data; writing programs and preparing reports; using various social media to highlight women's issues; and partnering and exchanging experiences with national, regional and international organizations.

The Women's Refugee Commission (WRC) improves the lives and protects the rights of women, children and youth displaced by conflict and crisis. WRC researches their needs, identifies solutions and advocates for programs and policies to strengthen their resilience and drive change in humanitarian practice. Since its founding in 1989, WRC has been a leading expert on the needs of refugee women and children, and the policies that can protect and empower them. Recognizing the significant impact of discriminatory nationality laws on displaced women and children and as a root cause of statelessness, WRC advocates for gender-equal nationality laws through the Global Campaign for Equal Nationality Rights, an international coalition of national, regional, and international NGOs housed at WRC.